

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 16-cv-14050

-v-

QUICKEN LOANS, INCORPORATED,

Defendants.

_____ /

MOTION ON DISCOVERY DISPUTES

BEFORE HONORABLE MARK A. GOLDSMITH

Detroit, Michigan, Monday, July 31st, 2017.

APPEARANCES:

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WITNESSES:

NONE

EXHIBITS

NONE

1 Detroit, Michigan.

2 Monday, July 31st, 2017.

3 At or about 1:37 p.m.

4 -- --- --

5 THE CLERK OF THE COURT: Please rise. The United
6 States District Court for the Eastern District of Michigan is
7 now in session, the Honorable Mark Goldsmith presiding. You
8 may be seated.

9 The Court calls case number 16-14050, United States
10 of America versus Quicken Loans, Incorporated. Counsel, please
11 state your appearances for the record.

12 MR. BUFFONE: Sam Buffone on behalf of the United
13 States of America.

14 MS. SONG: Harin Song on behalf of the United States
15 of America.

16 MR. MORGANROTH: Good afternoon, your Honor. Jeffrey
17 Morganroth on behalf of Quicken Loans.

18 MR. HEFFERON: Good afternoon, your Honor. Thomas
19 Hefferon for Quicken Loans.

20 THE COURT: Good afternoon.

21 MR. BUFFONE: Good afternoon, your Honor.

22 THE COURT: We've convened this hearing to resolve
23 some discovery problems that the parties are having. I've
24 reviewed the memorandums that were submitted. Have you worked
25 out any of the issues since the filing of these memorandums?

1 MR. MORGANROTH: The only issue, your Honor, that we
2 have worked out in part would be the attorneys' eyes only
3 designation issue. We've been trying to work that out.
4 There's still some issues in terms of getting to the finish
5 line, but that one we had made some progress on.

6 THE COURT: Okay. So let's work off the government's
7 memorandum. First issue raised by the government is the
8 compensation-related data. Do you want to tell me anything
9 more about that?

10 MR. BUFFONE: Your Honor, I think we addressed it in
11 our memorandum, but briefly, we had agreed to, based on some
12 representations by Quicken, to take certain data related to
13 compen -- or certain information related to compensation, but
14 then we did further inquiry and realized there was readily
15 available data fields related to their compensation,
16 specifically related to the speed bonus that we allege in the
17 Complaint. This is one of the key concerns that we have and
18 this data is needed to provide context to the bonuses that
19 Quicken Loans' employees and underwriters received. We need to
20 know, you know, how quickly underwriters worked and whether or
21 not this speed bonus forced them to work more quickly and
22 forced them to have problems with their underwriting because
23 they were working quickly in order to maximize their bonus.
24 The data fields that we've requested go directly to this and go
25 directly to the data in-points -- inputs that go into the speed

1 bonus and so we'd ask the Court to order Quicken to produce
2 these data points so that we can see how the speed bonus
3 operated in practice.

4 THE COURT: Okay. Mr. Morganroth?

5 MR. MORGANROTH: Yes, your Honor. This was an issue,
6 your Honor, that was addressed at the May 22nd hearing on
7 discovery disputes and the parties actually resolved this. At
8 the end of the hearing, the resolution of this issue was put on
9 the record and then the government followed up with a written
10 confirmation of that before your Honor ruled on that hearing on
11 May 24th, 2017 indicating they withdrew the issue from
12 consideration. Since that time, we feel that there's
13 essentially a bate and switch going on here. The government
14 now claims to reopen the issue on the basis that somehow they
15 were misled as to the existence of compensation data. The
16 truth is that no one was misled and they couldn't have possibly
17 been misled.

18 The list of the fields that Mr. Buffone is referring
19 to right now, that list was produced to the government May
20 18th, 2016 in this case, one year before the discovery dispute
21 and discovery hearing. This wasn't new information. They had
22 this information for over a year and the statements that I made
23 on the record were the exact same statements that I made in
24 meet and confer conferences, the exact same statements that
25 were made in written response -- written correspondence that

1 were submitted and in objections. Those statements were true
2 then and they're still true now. The best summary of the
3 compensation information is the pay stubs and that's what was
4 agreed to be produced; that is what was produced.

5 The reports that the government is referencing, they
6 don't even exist. Here's the disconnect. The fields that were
7 produced is essentially from a system as it sits now, big, and
8 that system has changed over the course of time. The fields
9 don't pertain for the most part to the time period that's
10 relevant to this case which is six to 10 years ago, 2007 to
11 2011. For instance, one of the fields is the hours worked.
12 Underwriters were not paid on an hourly basis during that time
13 period until after the relevant time period in this case.
14 Their hours weren't tracked until mid-2010, at all so there
15 wouldn't be any data that even exists for virtually all of that
16 time period for that just one category, but the reports that
17 have requested, there aren't such reports. That the system
18 doesn't contain historic come reports, can't give it to them.

19 The fields for the most part in terms of the data
20 doesn't exist. It's for --

21 THE COURT: Well, do any of the fields exist?

22 MR. MORGANROTH: Well, for instance the example I
23 just gave you in terms of hours tracked, after mid-2010 that
24 field does exist. We would have to do quite a bit of extraction
25 because the system doesn't work the same way as it did back in

1 2010, but there would have to be quite a bit of extraction done
2 to just to get that partial information. What the issue was
3 when we before your Honor was that the government had asked for
4 all of the data points that went into the compensation
5 decisions for any employee of Quicken Loans that touched an FHA
6 loan for each pay period and our position was as a response
7 that that information is not in a central repository, it would
8 be a monumental task to try to reconstruct it. There are a lot
9 of different data points and team leaders who manage and decide
10 and calculate income do it pursuant to a formula. Those
11 compensation plans were produced and there is no summaries as
12 sometimes it's done by e-mails, sometimes notes, sometimes
13 spreadsheets, sometimes a combination and it would be very,
14 very burdensome and a monumental task to go and try to figure
15 all of that out. The best summary was in the pay stubs which
16 has been produced and that was pursuant to this agreement.
17 This position --

18 THE COURT: When you say best summary, what do you
19 mean? Best summary of what?

20 MR. MORGANROTH: Of the compensation that was paid
21 and the breakdown of that compensation for each employee.

22 THE COURT: And would that include how bonuses were
23 calculated?

24 MR. MORGANROTH: Well, how bonuses are calculated is
25 based on the compensation plans. They have that. This would

1 be the actual bonus number would be broken down of what was
2 actually paid during that pay period for that employee, so they
3 would have the compensation plans that has the actual formula.
4 Now they have the pay stubs that they could apply and see what
5 actually was paid in terms of breakdown and bonus and so forth.

6 THE COURT: It would just be a number though, a
7 single number of what the bonus was for a particular pay
8 period?

9 MR. MORGANROTH: Yes, your Honor. It would be a
10 breakdown of each component of someone's compensation pursuant
11 to the compensation plan. This position that there was speed
12 bonus paid is false. There was no speed bonus paid. That is
13 false premise. Essentially, one of the data points that went
14 into the compensation formula was efficiency, but that data,
15 that was only one of the factors and it was modified and
16 qualified by other factors such what the base bonus amount was,
17 what the quality scores were, quality and efficiency were taken
18 into account hand in hand and companywide goals, so you would
19 need all this information to be able to make sense of this
20 theory that there was a speed bonus, but there aren't fields
21 for all this information. In fact there's not fields for most
22 of this information and all we feel is going on here is we're
23 being re-traded in an agreement that was entered into before
24 your Honor on a hearing that took place and there's just no
25 point to it and it's based on some data fields that were

1 produced a year before the hearing that the government had in
2 their possession and yet those data fields don't apply, again
3 I'm going to say for the most part because of the time period
4 that's at issue here, six to 10 years ago versus current and
5 that's the current fields that this system tracks now. So
6 unless there's anything else, your Honor, I mean, that's the
7 crux of the --

8 THE COURT: When you say it would take a lot of work
9 to extract some of this data, what do you mean by a lot of
10 work?

11 MR. MORGANROTH: Well, we'd have to go through for
12 each employee with their team leaders, we'd have to go through
13 e-mails. We'd have to search for spreadsheets. We'd have to
14 search for hard, handwritten notes, umm, because there's no
15 place to just do a search electronically, there's no file.
16 You're going to have to do that for every employee and that's
17 why --

18 THE COURT: How many employees are we talking about?

19 MR. MORGANROTH: Well, the original request was for
20 every employee who's touched an FHA loan from 2007 to the
21 present and each pay period. That was the original request.

22 THE COURT: We're not talking just about underwriters
23 here?

24 MR. MORGANROTH: That was not the discovery request
25 that was at issue. During the hearing it was argued well what

1 if we just ask about underwriters and that was a point that was
2 made by the government during the hearing and ultimately based
3 on the give and take, we settled on this and it was that give
4 us the pay stubs and it was give us for a select number, you
5 know, select positions and that's what we worked out and that
6 was the agreement that was put on the record before we left the
7 courthouse and there's nothing new since that time period,
8 nothing.

9 THE COURT: Okay, all right. Let me, any response
10 from the government?

11 MR. BUFFONE: Yes, your Honor, briefly. First, your
12 Honor, I have a copy of the compensation plan which I can
13 submit for the record if that would be helpful to you in
14 understanding this dispute.

15 THE COURT: I don't think so just yet, but go ahead.

16 MR. BUFFONE: Okay. Thank you, your Honor. Your
17 Honor, I think first addressing the prior agreement, that
18 agreement was reached off of based on the representations to
19 the Court that this data didn't exist and so the government
20 felt that there was no data that existed and there was no data
21 for the Court to produce and there was no data for the United
22 States to seek and so we --

23 THE COURT: Well, I heard Mr. Morganroth say that
24 some of this was produced back in May of 2016.

25 MR. BUFFONE: Your Honor, I think what he was

1 referring to is the, umm, the report that lists the data fields
2 in the database, not the actual data itself, so we --

3 THE COURT: But you knew what kind of information
4 supposedly might be available back in May of 2016?

5 MR. BUFFONE: This is a spreadsheet your Honor with
6 hundreds if not thousands of fields that go into this database
7 so while it had been produced and we don't dispute that, we
8 think that we were basing it off of Quicken's representations
9 about whether or not this data existed and believe that it's
10 Quicken's duty to inform us whether or not data exists that
11 they can extract response to our request, not the United
12 States' responsibility to go into their data systems, find the
13 data fields exist and identify for Quicken what data fields
14 exist and might be responsive. So while they had produced data
15 fields, we had been basing off of their representations or
16 their arguments that they weren't going to produce
17 compensated-related data and then at the hearing they then said
18 that well the data doesn't exist, we would have to do this
19 expansive search so we said on your representation that the
20 data doesn't exist, we will take the year-end summaries, but we
21 want to go back and do our own due diligence to make sure that
22 we don't see evidence that the data does exist. We've
23 identified, we did that and honestly your Honor I think that we
24 feel somewhat sandbagged by the representations that Quicken
25 has to do a search of e-mails and handwritten notes and other

1 things and then we go back and look at the data dictionaries
2 and we see that no, there are specific data fields that go to
3 these imputes in the compensation plans. We've looked at the
4 year-end summaries --

5 THE COURT: You say that there are data fields. I'm
6 heard from Mr. Morganroth that the data don't exist except
7 perhaps they might be or some of these data might be
8 extractable with great work, great effort. What's your
9 response to that?

10 MR. BUFFONE: One, this is the, you know, the reason
11 we raised this with Quicken is 'cause we wanted to know did the
12 data exist or not and this is the first time we've heard that
13 well some of the data may not exist and to the extent it does
14 exist, it would take great effort. They'd never raised with us
15 the burden of it. They never raised with us what years it
16 exists for and what years it doesn't so we haven't had a chance
17 to really have a fulsome conversation with Quicken about that.
18 For one, the speed bonus didn't exist for the entire time
19 period and so it did start I believe in either 2009 or 2010 so
20 that would be the time period that we're looking for these data
21 points for. You know, we've looked at the year-end summary.
22 We see that for some underwriters, their bonus is more than
23 their compensation so their base compensation based off of
24 their salary is less than the amount of their bonus for that
25 year so that's a very high bonus and we looked back at the

1 data -- at the compensation plans and we see that the base
2 bonus is based off of the number of units that they underwrote,
3 but then we see that the efficiency can get up to 125 percent
4 so it can more than double that base bonus. Then there are the
5 success of the team's company goals, but that only goes to a
6 five percent or 10 percent increase in the bonus. So the
7 biggest way if you look at the compensation plans to us to make
8 the bonus larger is to underwrite faster and so if underwriters
9 underwrite faster, they can make their bonus more than doubled.
10 We see very large bonuses --

11 THE COURT: So your point is going to be in terms of
12 the relevance here? The underwriters had an incentive to move
13 loans as fast as possible because their compensation depended
14 on that, right?

15 MR. BUFFONE: Yes.

16 THE COURT: And then is there going to be something
17 of an argument that says and because of that, they would also
18 have an insensitive to cheat, to not pay attention to FHA rules
19 because their compensation would be enhanced the more loans
20 that they managed to get through the system. That's the
21 argument the government's going to be making?

22 MR. BUFFONE: Yes, your Honor, I think it's two-fold,
23 that first Quicken incentivized their underwriters to approve
24 loans because if an underwriter rejected a loan, it didn't go
25 to their bonus and then second Quicken incentivized the

1 underwriters to not spend time underwriting their files because
2 they could more than double that bonus if they moved really
3 fast.

4 THE COURT: All right, so you have all of that
5 already by way of the plans, right? The plans establish the
6 incentives, right?

7 MR. BUFFONE: Yes, but --

8 THE COURT: What more do you want to get out of this?
9 You tell me, what more do you want to get out of this besides
10 the fact that you've already established that you can through
11 the plans that there is an incentive to move loans and perhaps
12 then there's an incentive to cheat?

13 MR. BUFFONE: Because your Honor it's impossible to
14 tell how the plans worked without seeing the data that goes
15 into it, so we don't know if the driver of the compensation is
16 the number of units they underwrote, if the driver of the
17 compensation is how quickly they underwrote. You know, we can
18 that there's a more than -- they can more than double their
19 bonus by underwriting quickly, but would don't know if their
20 bonus was based off of underwriting a lot of loans without
21 getting a speed bonus or if it was based off of underwriting
22 loans very quickly and doubling their bonus, so.

23 THE COURT: Well, didn't you tell me there was a cap
24 on one kind of bonus activity, there's only minimal, five
25 percent and the speed bonus was something that went up to 125

1 percent? Can't you tell by the pay stubs whether or not you're
2 dealing with a speed bonus or this other kind of bonus?

3 MR. BUFFONE: No, your Honor. The five percent cap
4 is these team goals that I believe Mr. Morganroth is saying
5 would be very difficult for them to find and very difficult to
6 see if an underwriter met them and so we represent them -- we
7 take help at his word and we recognize that we won't have full
8 insight into in five percent for meeting the team goal and an
9 extra five percent for meeting the company goal and so we won't
10 know if they got that five or that 10 percent, but the base
11 bonus is based on how many loans the underwriter approved and
12 then the efficiency bonus or the speed bonus can provide a zero
13 percent increase if it was below 1.5, you know, a 50 percent
14 increase at a certain rate, a 75 percent increase at another
15 rate, a 100 percent increase at another rate, a 125 percent
16 increase at another rate and so without knowing where they fall
17 into it, we can see that an underwriter got more than half of
18 their compensation based on a bonus, but is that because they
19 did it at the rate where they got no increase and it was all
20 based on the number of units that they underwrote or is that
21 because their compensation more than doubled because they
22 underwrote very quickly to maximize their speed bonus?

23 THE COURT: Well, aren't the incentives the same no
24 matter what? In other words, your theory is the more you push
25 through the system, the more you're going to get paid, right?

1 MR. BUFFONE: Yes, your Honor.

2 THE COURT: There's just different ways of measuring
3 it, right? There's an efficiency bonus that you get based on
4 pushing loans through based on units of time, right, and then
5 other bonuses are based on other factors, but in all cases the
6 theory of the government remains the same; the more approvals
7 there are, the higher the pay and the greater the incentive to
8 cheat. Isn't that right?

9 MR. BUFFONE: Yes, your Honor.

10 THE COURT: So what difference does it make if we
11 tune exactly what part of the bonus reflects what incentive?
12 The base incentive is always the same; the more you approve,
13 the more you make, the greater the incentive to cheat. Am I
14 missing something?

15 MR. BUFFONE: I think the one part that you're
16 missing is the jump through a lot of hoops. When
17 Mr. Morganroth started talking about burden, he talked about
18 going back and finding handwritten notes, going back and
19 finding summary Excels, going back through e-mails. We're not
20 asking that. We're saying here are 13 fields, to the extent
21 they exist and have data, please do the extract for us. To the
22 extent they don't exist or don't have data from the relevant
23 time period, then, you know, we'll see if they're picked up
24 through ESI searches and if they're not, then --

25 THE COURT: When you say do the extracts for us, what

1 do you mean specifically by that?

2 MR. BUFFONE: We would like Quicken to have their
3 database engineers and look at these fields and see if for the
4 employees, the underwriters who signed the certification to HUD
5 that we have reached a comprise on the ones that we are going
6 to focus are compensation-based requests for, if data exists
7 for those employees from the relevant time period, then please
8 extract that data and produce it to the government.

9 THE COURT: How many people is that?

10 MR. BUFFONE: I believe it's around 23, your Honor.

11 THE COURT: So will they have to write code then to
12 locate this data do you think? Is that what they would have to
13 do?

14 MR. BUFFONE: You always have to write code when you
15 extract information from a database. The question is how
16 complex the code is. To the extent that you're identifying the
17 data field, you're identifying the employees, relational
18 databases which is what we understand Quicken has, the burden
19 in writing code to pull data from a relational database should
20 not be that great although I'm not an expert in Quicken's data
21 system, so I don't know for sure. Unless the Court has any
22 other questions, I'll rest, your Honor.

23 THE COURT: Okay. Let's move on to the next issue,
24 deposition transcripts. I understand the government's
25 position. Let me hear from Mr. Morganroth about that.

1 MR. MORGANROTH: Yes, your Honor. Again, this issue
2 is based on a false premise. Each one of the cases that the
3 government is referencing has nothing to do with our case in
4 this courthouse. None of the issues are the same. There are
5 no FHA guidelines at issue in any of those cases. There are no
6 value appeal issues in any of those cases. This was an issue
7 that was a subject of an extensive meet and confer conferences
8 and, you know, essentially it went away and I'm not sure why
9 it's come back now. It went away prior to the April 20th, 2017
10 order your Honor issued that each side was supposed to raise
11 whatever discovery disputes they had. This is an old discovery
12 dispute from eight months ago and we, we addressed the reasons
13 why these cases had nothing to do with the current case that's
14 before your Honor and I can go through each one of them to
15 explain it. For instance --

16 THE COURT: Well, before you do that, I'm just trying
17 to understand. Aside from the argument that these are not
18 relevant to our subject matter, there's no great burden in
19 producing these, right? We're just talking about some
20 deposition transcripts?

21 MR. MORGANROTH: Well, your Honor, those cases have
22 protective orders and there's confidentiality agreements in
23 those and Quicken Loans is not the only party that has a say in
24 whether those documents would be released, now so the problem
25 there was we asked the government well it seemed like they

1 might have some of these transcripts irrespective of that they
2 shouldn't because there are protective orders and
3 confidentiality agreements, but it seemed like they had some of
4 these transcripts because they cited to some of these
5 transcripts in a motion to compel in this court and in previous
6 pleadings that were filed. One was the Alig case which
7 apparently the government and the lawyers in Alig are working
8 together it seems like and another case, the Nomura case, they
9 cited to a transcript.

10 THE COURT: When you say there are protective orders
11 and other parties involved, who else is involved on the defense
12 side other than Quicken?

13 MR. MORGANROTH: Well, it depends what case -- well,
14 there's plaintiffs and plaintiffs entered into a protective
15 order as well.

16 THE COURT: Well, do you think the plaintiffs are
17 going to care if the government sees this?

18 MR. MORGANROTH: They may, I don't know. I mean, we
19 doesn't have the right to waive their right to the protective
20 order. They have to waive that right, too.

21 THE COURT: All right, so assuming that could be
22 addressed, is there another objection to turning these over?

23 MR. MORGANROTH: Well, they're just not relevant.
24 They're not relevant to anything. I mean, for instance the
25 Alig case, that's a case based on the estimate of value that a

1 borrower provided in an application was turned over to an
2 appraiser before the appraisal was done. That's what that case
3 is about. There are no FHA guidelines in that case. There's
4 no value appeals. I mean, it just doesn't have any relevance.

5 The Brown case, that case is not about value appeals,
6 that's about finance charges and a property value that again
7 was based, allegedly based on an estimate given by a borrower
8 in an application that was turned over to an appraiser. That's
9 what that case is about and it's a different time frame.
10 Almost all of these cases are a different time frame. That's
11 from 2006. Our case here is 2007 to 2011. There's no FHA loan
12 even involved in the Brown case. None of these cases have any
13 FHA guidelines that are at issue and that's the difference
14 between the Wells case. The reason why the Wells transcripts
15 were relevant is because there were FHA guidelines in terms of
16 the meaning, interpretation and construction that are at issue
17 in our case and in addition the reason why the Wells case
18 transcripts are relevant is because of the materiality issue
19 under Escobar. None of these cases have any FHA guidelines at
20 issue so they can't --

21 THE COURT: Okay. Let me hear from the government to
22 see what they think is the relevance here.

23 MR. MORGANROTH: Okay.

24 MR. BUFFONE: Thank you, your Honor. We have
25 reviewed some of the transcripts that plaintiff's counsel has

1 produced to us and some of the cases that were not covered by
2 the protective order, but they were in redacted form because
3 where they were covered by a protective order, we did not
4 receive that portion of them. From the portions that we did
5 review, the transcripts do seem relevant. They provide
6 insights into the way that Quicken's processes and motivations
7 in underwriting loans. For the majority of the cases that we
8 requested other than Brown and Nomura, I believe that they do
9 involve FHA loans and so we believe that they will be directly
10 relevant to this case and we just think that is way to
11 streamline discovery. If the -- we're asking for the
12 transcripts of key individuals who are on both of the parties'
13 initial disclosures and so we think that it allows us to
14 streamline discovery, to see what those people had said before.
15 Many of these individuals testified only a 30B6 basis on behalf
16 of Quicken Loans. We would just like to know the position that
17 Quicken took in related litigations about origination in
18 underwriting and mainly about origination in underwriting of
19 FHA loans.

20 THE COURT: What about cases that have nothing to do
21 with FHA loans? What's the relevance there?

22 MR. BUFFONE: So the Brown case and the Nomura case,
23 from the excerpts that we've seen in public filings, while we
24 haven't actually reviewed the transcripts, they generally talk
25 about Quicken's processes in underwriting loans which is not

1 that different our understanding between the process used to
2 underwrite a conventional loan versus the process used to
3 underwrite an FHA loan and so we think that there is
4 significant overlap in that processes. We haven't generally
5 asked for discovery into Quicken's underwriting of conventional
6 loans to try and lessen the burden, but in case like this where
7 there is limited to no burden in producing the transcript, we
8 think it is relevant to the way that they underwrite and the
9 way that their underwriting processes work as there's
10 significant overlap and finally --

11 THE COURT: How would you deal with the protective
12 order issue?

13 MR. BUFFONE: As I was just about to say, your Honor,
14 we are happy to approach plaintiff's counsel in each of these
15 cases and obtain the consent if Quicken would prefer. We don't
16 think that that should be a problem at all.

17 THE COURT: Are there any of these other parties in
18 these other cases aside from Quicken and the plaintiffs?

19 MR. BUFFONE: Not that I'm aware of, your Honor, but
20 you have counsel in this case. You know, I know that
21 Mr. Hefferon at least is counsel for TSI and Quicken and Alig,
22 so I think that they know much better than I do. I believe TSI
23 might be a party in some of these cases, but that is a sister
24 company of Quicken where there's significant overlap between
25 the two companies, but other than TSI, I'm not aware of parties

1 other than the plaintiffs and Quicken. Thank you, your Honor.

2 THE COURT: All right. Let's move on to tracking
3 items.

4 MR. MORGANROTH: Your Honor, can I just address two
5 of those questions briefly?

6 THE COURT: Okay.

7 MR. MORGANROTH: One is one of the cases is
8 FHFA v. Nomura. Quicken's not even a party to that case. This
9 is one of the cases that was asked for in terms of depositions.

10 THE COURT: So what do you care if Quicken wasn't a
11 party to the case?

12 MR. MORGANROTH: Because there's a protective order
13 in the case in terms of the deposition and that case --

14 THE COURT: Why don't you let the other parties to
15 the case worry about the protective order? If your client is
16 not a party to it, what do you care?

17 MR. MORGANROTH: Well, my client is a party to the
18 protective order. As a witness they had to sign off on the
19 protective order. My point here, your Honor, is you asked if
20 there were other parties involved. There are a lot of other
21 parties, that's the Nomura case. It's a totally different time
22 period. It's 2005 to 2007. That's an RMBS case about
23 prospectuses and whether or not they misrepresented that loans
24 complied with underwriting guidelines. None of the these cases
25 deal with FHA loan underwriting guidelines and the final point

1 I just want to make your Honor is to Mr. Buffone's point, the
2 FHA loans that are at issue in our case were underwritten by
3 underwriters who only did FHA underwriting. They didn't do
4 conventional underwriting, so the point that Mr. Buffone's
5 trying make is well it might give us insight 'cause these are
6 conventional loans. It's a different set of underwriters that
7 work on the conventional loans versus the FHA loans and that's
8 why none of these cases could possibly mean anything to our
9 case here because they don't deal with FHA loans, FHA
10 guidelines and it's a different set of underwriters,
11 underwriters who don't work on FHA loans.

12 THE COURT: All right, thank you. Let's move on to
13 item three which is the tracking items related to management
14 exceptions. All right, Mr. Buffone, you want to address that?

15 MR. BUFFONE: Yes, briefly, your Honor. I think
16 there are three things that we're requesting here. There's
17 underwriter and a, underwriter exceptions and appraiser review
18 exception tracking items and we believe these are management
19 exceptions by another name. The Complaint in paragraphs 117
20 through 118 specifically discusses underwriter exceptions as
21 being another type of management exception when the underwriter
22 decides to grant the exception on their own rather than going
23 to management. The tracking items were the exception text
24 where the text track item discusses the exception that was
25 requested, helps give context to help us understand why the

1 exception request was made and if the exception was granted to
2 FHA guidelines. We think these clearly fall within the Court's
3 prior order and that they're needed to help us prove knowledge
4 in this case, your Honor.

5 THE COURT: Just a second.

6 (Pause)

7 THE COURT: Are appraisal review exceptions the same
8 as value appeals or is there a subset or something that
9 straddles the value appeals tracking items?

10 MR. BUFFONE: I think, your Honor, we have limited
11 insight and limited discovery into receiving this. You know,
12 to the extent Quicken has merely said that they won't produce
13 them, I know that we have gotten them for some loans. I will
14 say I believe that they are exceptions for problems with
15 appraisals where there is a problem with the appraisal that
16 does not specifically such as -- there are many requirements in
17 reviewing an appraisal to make sure it's an acceptable
18 appraisal by FHA standards as well as by USPAP, the standard
19 appraisal standards and so I believe these are exceptions more
20 broadly to the standards in having an acceptable appraisal for
21 FHA and for a loan in general.

22 THE COURT: So are these loans where there was an
23 exception made for some requirement that pertained to an
24 appraisal, but it didn't deal with a value appeal problem? Is
25 that right?

1 MR. BUFFONE: Yes, your Honor. So when underwriting
2 a loan, you underwrite -- there's kind of two basic buckets
3 that you underwrite. There's the credit underwriting which is
4 the majority of what we're talking about in this case and so
5 that's reviewing the borrower's income, reviewing their debts,
6 reviewing their credit score. Then there's the collateral
7 underwriting, so making sure not just the borrower has the
8 capacity to repay the loan, but if they were to default, the
9 collateral holding up the mortgage, the house, does that have
10 the value that you think it has so that you can recover the
11 unpaid principal balance even if the borrower doesn't make a
12 payment so this goes to the collateral underwriting and it's
13 not that you just get an appraiser, appraisal and you're done,
14 you still have to underwrite that appraisal, make sure that
15 appraisal is sound, make sure that appraisal meets the relevant
16 standards and so we think these are management exceptions that
17 go to collateral underwriting rather than management exceptions
18 that go to credit underwriting.

19 THE COURT: Okay.

20 MR. BUFFONE: Thank you, your Honor.

21 THE COURT: All right. Mr. Morganroth?

22 MR. MORGANROTH: Yes, your Honor. This is another
23 one that has been resolved by the Court pursuant to May 26th
24 order and what we see is happening here is the government is
25 asking for more. They just want more. After May -- pursuant

1 to this Court's May 26th order, Quicken Loans was required to
2 produce the management exception track items for the claimed
3 loans. We did that. There are five management exception
4 tracking items. Those were produced on June 23rd.

5 The tracking items that they now seek are not
6 management exception tracking items and for some reason they
7 decide they want more and their pigeonholing it into the order
8 that had nothing to do with these other tracking items and I
9 might add, your Honor, that these tracking items have been
10 produced pursuant to -- these items -- I'm sorry, these
11 management exception tracking items plus the ones that are at
12 issue now were all produced with respect to the 487 loan sample
13 which we learn now is only 350 loans, they call it loan
14 selection. What the hearing was about is whether or not the
15 management exception tracking items should be produced for all
16 of the claim loans and what your Honor ruled at that time was
17 yes, produce those managements exception track items, there are
18 five of them and we've done that.

19 The parties did meet and confer on this issue and
20 we've explained to the government that the tracking items that
21 they're referencing now are not management exception tracking
22 items. One of these tracking items was simply used to alert
23 underwriter when a loan had to be re-underwritten. That's not
24 a management exception tracking item. Another one of them is
25 when there would be an internal audit done by what's called

1 Quicken University. Not a management exception tracking item.
2 Two others are used to just document decisions that are made,
3 not management exception decisions, just decisions that an
4 underwriter makes.

5 THE COURT: Are you saying in all these cases you've
6 just mentioned, there's no person above the underwriter who is
7 making a decision?

8 MR. MORGANROTH: Correct. Yes, your Honor. Another
9 one concerns request for vendor items to be completed in a
10 manner and an order other than the normal hot list
11 prioritization so there's hot list prioritization. There's a
12 deviation where the vendor items are going to be completed, a
13 request to be completed in a different order; again, no
14 management exception. There's no management that's involved in
15 that.

16 THE COURT: What's a hot list?

17 MR. MORGANROTH: A hot list is just a task list and
18 that prioritize what should be done in what order. Another
19 one, the final one concerns wire funds for rush closing
20 scenarios. Not dictated by management, not an exception, this
21 is just when there's a closing that has to take place faster,
22 there is a tracking item that talks about what the funds would
23 have to be wired. None of these are management exception
24 tracking items and, you know, I --

25 THE COURT: Just a minute, just a minute.

1 (Pause)

2 THE COURT: Okay, go ahead.

3 MR. MORGANROTH: Again, the claim population appears
4 to and we'll get to this on one of the issues we're raising,
5 appears to have changed in the case. It's changed from 3,600,
6 at one point went to 4,600, now it's down to 2835. We've
7 produced the management tracking exceptions for all the claimed
8 loans even though the case is really about 1,400, 1,600 loans
9 less, but these tracking items that are being raised now, I
10 just want to reiterate they've been produced as to the loan
11 sample. They have them on the loan sample. It's just a
12 question of whether they're entitled to more now on the claim
13 loans when this issue was brought up and they don't fit under
14 management exception tracking items even though the government
15 is somehow trying to pigeonhole them under that by saying we
16 have to produce them. That's, that's the whole gist, your
17 Honor.

18 THE COURT: Okay. All right, number four is
19 testimony of former secretary of HUD, Shawn Donovan. So what
20 is it you want to find out from Mr. Donovan, Mr. Morganroth?

21 MR. MORGANROTH: Yes, your Honor. The first thing
22 that I would like to address since we've seen their papers on
23 this is the standard. It's not up to us to have the burden to
24 prove that Mr. Donovan should appear. Under the Sixth Circuit
25 case, Serano (phonetic), it's actually flipped. It's the

1 government's burden to show based on a clear and particularized
2 statement, not stereotypical or conclusory allegations, that
3 one of the Rule 26(c) elements that's enumerated in the Rule is
4 present. The government hasn't done that and they can't do
5 that.

6 In addition, there couldn't possibly be any
7 inconvenience to the government here under the Apex Doctrine
8 because Mr. Donovan doesn't work for the government any longer.
9 He's not a government employee and under the Tucci (phonetic)
10 case, the Apex Doctrine wouldn't even apply here, but getting
11 to your Honor's question and that's Tucci v. City of Suffolk,
12 why is it that we want to take Mr. Donovan's deposition. We
13 want to take his deposition because it goes to the heart of the
14 matter under materiality under Escobar and it goes to the heart
15 of the matter of interpretation of FHA guidelines and the
16 quality of Quicken Loans' FHA loans that they originated.
17 There were direct communications between Mr. Donovan and
18 representatives of Quicken Loans regarding these subject
19 matters.

20 THE COURT: You mean specific loans?

21 MR. MORGANROTH: No, the overall quality of their
22 lending and their compare ratios that measures defaults. There
23 were discussions that related to the quality of Quicken Loans
24 FHA underwriting, the importance of Quicken Loans to the FHA
25 program, the FHA program practices and procedures, issues that

1 go to materiality, issues that go to HUD's --

2 THE COURT: Tell me about that, materiality? How
3 would anything he has to say bear on materiality?

4 MR. MORGANROTH: Well, because there were topics that
5 came up in terms of whether or not those categories of issues
6 were something that was important to the FHA in terms of
7 seeking either indemnification or a repurchase or cancelling or
8 never endorsing insurance policies. Those topics were
9 discussed with Mr. Donovan, it was more than one
10 representative. If Mr. Donovan wants to come in and
11 characterize it as something else, well then he should be doing
12 that under oath. We saw in their papers that there's this
13 position that he wants to take a position that Mr. Gilbert
14 pressured him. That's not true, but he should say that under
15 oath if that's what he wants to testify to and it wasn't just
16 Mr. Gilbert who he had communications with.

17 Mr. Donovan also was in the middle of HUD's efforts
18 to recover losses that were suffered as a result of the global
19 financial crisis, losses to the FHA program and he is in the
20 middle of the FHA program's financial issues. We did depose
21 the deputy assistant secretary July 28th and he testified that
22 he had communications with Mr. Donovan that did relate to
23 Quicken Loans and he also testified that Mr. Donovan was in the
24 middle of the FHA program practices and procedures in terms of
25 enforcement mechanisms, investigations and their efforts to

1 recover the losses that the FHA fund incurred during this
2 financial crisis. There are issues in part of our defense that
3 there was a program that was followed and instituted by HUD
4 that had nothing do with wrongdoing. The whole point was to
5 try and find lenders who had deep pockets and those lenders
6 were the top lenders and to try and shake them down for
7 recovery of dollars that they could use to prop up their
8 reserve fund. Mr. Donovan appears to have been in the middle
9 of that based on the testimony of Deputy Assistant Secretary
10 Coulter.

11 THE COURT: You're saying the deputy secretary said
12 Mr. Donovan was involved in the shakedown effort?

13 MR. MORGANROTH: Well, he didn't use those words, but
14 he was involved --

15 THE COURT: What did he say?

16 MR. MORGANROTH: He said that he was involved in that
17 program and that he --

18 THE COURT: What program?

19 MR. MORGANROTH: This program to target large lenders
20 for the purpose of generating revenue for the fund and
21 Mr. Coulter testified about details of that program and the
22 purpose of the program and his viewpoint in terms of an opinion
23 as to the program and he testified that Mr. Donovan was in the
24 middle of that, but he didn't testify to what Mr. Donovan's
25 view point was or opinion or statements or any of that.

1 He testified that he did have communications with
2 Mr. Donovan about or relating to Quicken Loans and other
3 lenders as well. Mr. Donovan is not a government employee. It
4 will not inconvenience the government. That is half-day
5 deposition that we've asked for and I did notice in their
6 papers they cited the Budroe (phonetic) case, but that's old
7 superceded law. That was a 2008 case that's been superceded by
8 Sixth Circuit case in Serrano, 2012 and the only issue is
9 whether or not the government could come forward with
10 particularized statements of harm as referenced in Rule 26(c)
11 which they have not and they can't because Mr. Donovan is not
12 even an employee of the government. Under the Tucci case, the
13 Apex Doctrine wouldn't even apply.

14 THE COURT: Okay. Mr. Buffone?

15 MR. BUFFONE: Thank you, your Honor. First, I think
16 it's important to look at what it is that Quicken Loans has
17 said they think Secretary Donovan is relevant for. First, they
18 say he has extensive knowledge of the FHA program and while
19 Secretary Donovan as the secretary of HUD certainly has
20 knowledge of the FHA program, that simply is not the standard
21 for deposing someone who is a cabinet-level secretary. If
22 having knowledge of the program means that Secretary Donovan is
23 open for deposition, it would lead to the absurd result of him
24 being deposed in every Section Eight case, every fair housing
25 case, every case about HUD grants. HUD does lots of work that

1 the secretary certainly has knowledge of the work that HUD does
2 in all these different programs, but there's been no showing of
3 particularized knowledge or particularized involvement of any
4 FHA standards that are at issue in this case. In fact, on
5 Friday Quicken took the deposition of one the line level -- of
6 one of the, a HUD employee who talked about when there's
7 disagreement within HUD, what happens and it's elevated to the
8 FHA commissioner and the FHA commissioner decides that, not
9 that it goes all the way up to the secretary and there's no
10 evidence here that the secretary's office was involved in any
11 of the FHA guidelines that are at issue here.

12 The next thing that Quicken says this is relevant to
13 is HUD's efforts to recover losses? First I'd like to read to
14 you from the transcript from Friday about this and the question
15 was what was the time frame of those discussions, those
16 discussions were happening -- so there's a discussion about the
17 enforcement efforts that HUD, umm, that HUD had and then there
18 is okay, what was substance of communications you had with the
19 Secretary Donovan? Answer, again those would have been fairly
20 high level conversations relating to the process and my opinion
21 on the process and approach. Question, and in your discussions
22 and communications with Secretary Donovan, they related to
23 Quicken Loans as well as some of the other lenders as well that
24 were in the program so to speak? Answer, so there was no
25 discussion with Secretary Donovan specific to Quicken Loans.

1 So again the testimony was that they weren't
2 discussions specific to Quicken Loans, there's discussions
3 generally related to the effort to enforce FHA underwriting
4 guidelines against lenders who had committed fraud against the
5 FHA program. The efforts, HUD's efforts and DOJ's efforts to
6 recover losses to the FHA program is simply irrelevant to this
7 case. There have been numerous lenders that have settled with
8 the Department of Justice. All of those settlements have
9 involved agreed upon statements of facts where the lenders have
10 admitted to their conduct. If the Court would like to review
11 those statements of facts about the settlements in other cases,
12 we can certainly submit them, but we don't think the fact that
13 there were investigations of other lenders that led to
14 settlements where the lenders admitted to facts that form the
15 basis for the government's allegations that they had defrauded
16 the FHA program is relevant to this case at all. The fact that
17 the government in a False Claims Act enforcement action is
18 seeking to recover the monies that the government paid out as a
19 result of those false claims is not controversial, but we also
20 think not relevant to this action.

21 The last category that Quicken seeks to depose
22 Secretary Donovan about is his personal communications with
23 Quicken executives and we know nothing about those because
24 Quicken has and continues to be extremely vague about what
25 those communications are. When did those communications

1 happen? Who had those communications? What was the content of
2 those communications? Quicken has provided none of those
3 details and so we have no basis to understand that Quicken is
4 seeking relevant information. From the best we can tell, those
5 communications took place well after the relevant time period,
6 well after the facts at issue in this case and they have to
7 bearing or relevance to this matter at hand. To the extent
8 that Quicken wants to talk about process, your Honor, Quicken
9 has not served a Rule 45 subpoena, Quicken has not noticed the
10 deposition and so there's nothing for the Court to actually
11 rule on. To the extent the Court wants more a detailed
12 statement from Secretary Donovan about the burden that would be
13 present here, we think Quicken should first have to go through
14 the steps of actually noticing the deposition and allow us to
15 more fully brief the issue for the Court, but if we were to
16 fully brief the issue for the Court, we think that this will
17 directly relate to the deposition of Priscilla Presley that the
18 Court in the Sixth Circuit Cintas upheld that they noted that
19 she had no knowledge relevant to the particular trademark and
20 state law claims at issue here and we think that there will be
21 little knowledge of the core relevant facts at issue in this
22 case and that there was harassment and burden based on having
23 that deposition when there was no relevance.

24 THE COURT: Well, what about the argument that
25 Mr. Donovan is no longer with the government so there's no

1 burden on the government?

2 MR. BUFFONE: Well, there's still burden on Secretary
3 Donovan, your Honor. You don't get to depose anyone in any
4 case. They have to have some relevance. I mean, he still has
5 to take time out of his day, he still has to show up for a
6 deposition, he still has to give testimony. If that testimony
7 is not going to be relevant, I don't understand why we would
8 burden the former secretary with that and there really is a
9 chilling effect on people serving in the government if they're
10 going to be forced to testify about anything that tangentially
11 touches on their time as secretary. As secretary of HUD, he
12 has oversight on everything that HUD does. That doesn't mean
13 that in any litigation that involves HUD he should be drawn
14 into it. Yes, if Quicken can make that particularized showing
15 that he was somehow involved in the facts and issues of this
16 case, that would be a different issue and a different
17 conversation we would be having. We are allowing Quicken to
18 depose high-level people. As I just said, they deposed the
19 deputy, umm, the deputy assistant secretary for FHA. They are
20 taking depositions and have asked for depositions of political
21 people, but when those people are directly involved in the FHA
22 program, when they have direct involvement with the facts and
23 issues at issue in this case, those depositions are proper.
24 When they haven't made any showing about how Secretary Donovan
25 is relevant to this case at all and have merely put forward

1 irrelevant things that they want to ask the secretary about,
2 about the government's enforcement actions against FHA lenders,
3 that has no relevancy to the facts and issues of this case, to
4 the government's claims or Quicken Loans' defenses in this
5 case. That simply should not be allowed.

6 THE COURT: All right. I want to move on to the next
7 item about Quicken asking for what the government says is work
8 product regarding the sample universe.

9 MR. MORGANROTH: Yes, your Honor. Can I just correct
10 in terms of Mr. Buffone's reading of the deposition transcript
11 in the last issue?

12 THE COURT: I don't think you have to. Let's just
13 move on to the work product issue.

14 MR. MORGANROTH: Thank you, your Honor. So this is
15 the sampling methodology disclosure issue in your Honor's May
16 26th order, the government was required to disclose its
17 sampling methodology and justification by July 7, 2017. On
18 that date there was a disclosure made, it was in answer to, a
19 supplemental answer to an interrogatory requesting that
20 information. There were several deficiencies with that
21 disclosure. We did have a meet and confer conference on that.
22 The government corrected two of the deficiencies, but two other
23 deficiencies still remain.

24 The first deficiency is the government won't provide
25 to us the justification why the population of 2,835 loans was

1 chosen to be sampled. The disclosure explains that 2,835 loan
2 population consists of loans that become or became 60 days
3 delinquent within two years, but the question is what is the
4 justification for choosing a sample population based on that
5 criteria? Your Honor did order them to provide the
6 justification. That is an important issue because the field
7 keeps changing. 2,835 loans is just a subset of the claim
8 loans that's referenced in the Complaint. That was 3,885 loans
9 and that's the Complaint in section, or paragraph 101 and then
10 the 2,835 loans is a subset of the amount of claim loans that
11 were referenced in a list that was provided to us in a document
12 production request, the third set, that was 4,632 loans. So
13 the question is is this case now about 2,835 loans? If it is
14 because that's the sample population, we should be told that
15 and we should be told why is it about those loans as opposed to
16 the 3,885 loans or the 4,632 loans that were referenced in
17 other pleadings. So that's the first deficiency.

18 The second deficiency is when the government provided
19 us with their list of sample loans, there were 487 loans.
20 Ultimately it was disclosed to us that only 350 of those loans
21 constituted a sample and that was based on pressing by your
22 Honor. If you recall the government wouldn't tell us anything
23 about their sample, they just had this 487 loan list and we
24 were led to believe that was the entire sample. So we've
25 learned since then that there are 137 other loans. Is that

1 part of their sample or not? We've heard at oral argument and
2 the last time we were here that those loans were chosen and
3 they should be treated as part of the sample and should be part
4 of this special discovery agreement that the parties had as to
5 what should be furnished in discovery regarding the sample, but
6 if it's part of the sample, then we need to know how they were
7 selected, the 137 loans which we've never gotten a straight
8 answer and it's not part of their disclosure. If it's not part
9 of the sample, then we have a problem and the problem is why is
10 the government entitled to this special discovery on these
11 other 137 loans pursuant to an agreement that deals with the
12 sample and why aren't we getting answers to our discovery
13 requests relating to other loans that we select? The
14 government isn't free to just pick which loans the parties can
15 conduct discovery on. We can ask questions about loans, but
16 we're told they're not going to give us any answers about these
17 other loans because they're not part of the sample and they're
18 going to prove this case using sampling which we contest, so
19 they can't have it both ways. Either it's part of the sample
20 and give us the justification and the criteria and the
21 methodology for selecting them. If it's not a part of the
22 sample, fine, then it shouldn't -- those 137 loans should not
23 be part of the special discovery agreements and if they are,
24 then we're entitled to answers on all the other loans as well
25 that we select for whatever reason, so those are the issues

1 there, your Honor.

2 THE COURT: Okay. Mr. Buffone?

3 MR. BUFFONE: Thank you, your Honor. The United
4 States believes that we complied with the Court's order and did
5 provide exactly what the Court instructed us to. We provided
6 them the sample methodology and the justification for why that
7 sample methodology was used. As part of that, we stated that
8 counsel instructed the expert, the consulting expert to draw
9 the sample population in a certain way and that was way that
10 the sampling expert drew the population. What Quicken is
11 asking for is why counsel instructed the effort -- the expert
12 to identify the loans in that -- to identify that category of
13 loans as a sampling population. That was counsels' choice made
14 as a litigating decision and that's core work product that
15 Quicken is asking the government to disclose. This was not a
16 decision made by an expert, this was a decision made by
17 counsel.

18 THE COURT: So you're saying the government's never
19 going to try to justify why it chose that 60-day criterion?

20 MR. BUFFONE: I don't think that we -- I don't know
21 why it's, when we would need to justify why we chose that
22 sample population.

23 THE COURT: I don't know if you would. I'm just
24 saying are conceding now on the record the government's never
25 going to try to justify why it picked that criterion?

1 MR. BUFFONE: I, I don't know I can go definitive
2 your Honor because I need to think about if it would ever
3 become relevant, but I don't believe that it would be relevant,
4 your Honor.

5 THE COURT: Well, can you have it both ways? Can you
6 say we're not going to tell why we picked this, but we're going
7 to at some point try to justify why that's a good criterion for
8 use in sampling?

9 MR. BUFFONE: I don't -- it doesn't -- I guess your
10 Honor the question is is it a good criterion for use in
11 sampling? It doesn't go into the reliability of the sample.
12 You define a sampling universe, you pull a sample from that and
13 you try and extrapolate back to the universe. We're not trying
14 to extrapolate broader than the universe and so the
15 justification for why the sample is a good sample is based on
16 why did you pull those 350 from the sample universe and why is
17 it that you can extrapolate from those 350 back to the sample
18 universe and so the definition of the sample universe is just a
19 definition that we did not -- a consulting expert did not make,
20 that was made by counsel and so it's what is in the sample
21 universe and what is outside of the sample universe I think is
22 irrelevant to the issue of sampling.

23 THE COURT: Okay.

24 MR. BUFFONE: Furthermore, your Honor, the selection
25 of the 137 that were part the loan selection that's outside of

1 the loan section, it was again a determination made by counsel
2 based on why we thought on what counsel believed would be loans
3 that would help prove the United States' case and again that
4 would be asking, you know, like asking Quicken why they made a
5 discovery request and that's like why the United States made a
6 discovery request is because the United States made a
7 determination about that would be the most relevant information
8 to help prove the United States' case and that's simply asking
9 for the United States, the attorneys for the United States,
10 their mental impressions and why they selected those loans.

11 I just also want to briefly address that the United
12 States is not sure what Mr. Morganroth is talking about when
13 he's talking about the United States is trying to limit Quicken
14 Loans' discovery to just the loans that are in the sample.
15 Quicken loans has asked for broad discovery and did the loans
16 that HUD has reviewed related to Quicken Loans as well broad
17 discovery into loans underwritten by other lenders. We have
18 provided that discovery about loans underwritten by Quicken
19 Loans and we've provided them with information about all of the
20 reviews that HUD has done of the loans underwritten by Quicken
21 Loans and have not tried to narrow that to just the sample
22 loans. We certainly have pushed back on discovery into other
23 lenders and also direction from the Court have been providing
24 some discovery into other lenders, but as it relates to Quicken
25 Loans, we have not been trying to limit their discovery based

1 on these loans and said that they can't select other loans that
2 they would like discovery into that Quicken Loans underwrote.

3 THE COURT: Well, regarding the 137 loans, is the
4 government saying that those are not part of the sample from
5 which the government would be trying to extrapolate to a
6 broader population?

7 MR. BUFFONE: So some of those loans are in the
8 sample universe and so they would be within the sample universe
9 that the government is extrapolating to, but they are not part
10 of the sampled loans so they are not part of the sampled
11 population, that is the loans that would be used to extrapolate
12 to the entire universe, but many of those loans do fall within
13 the universe.

14 THE COURT: All right. Well, what you had said at an
15 earlier hearing I though was that you were going to try to
16 prove certain corroborating actions by looking at the 137
17 loans. Is that -- first of all did I get that right?

18 MR. BUFFONE: Yes. Your Honor, I think it's
19 two-fold. I mean, this also goes to the next issue about the
20 issue of disclosures, but the United States has said that it
21 intends to prove its case in part through sampling. Quicken
22 Loans has retained its right to challenge sampling and
23 challenge the sampling is the proper way to prove the case and
24 while we believe that sampling is completely proper here, as
25 long as Quicken maintains an objection, the United States needs

1 to litigate this case with the understanding that that's one of
2 Quicken's defenses that sampling should not be allowed to be
3 used and so the United States is retaining its right to prove
4 its case both through sampling and not through sampling.

5 THE COURT: So if for whatever reason your sampling
6 case falters, are you saying then that the government wants to
7 try to prove improprieties with regards to these 137 loans and
8 prove up damages with those specific loans?

9 MR. BUFFONE: I think that we would see how we could
10 prove our case and what specific loans we could prove our case
11 with. It would be very difficult, but the United States, you
12 know, while Quicken is trying to have it both ways. If they
13 want to hold out the right the challenge sampling and say that
14 sampling should not be used while saying the United States
15 should not be able to prove its case were we to prevail on our
16 defenses. We certainly think that that sampling is proper
17 here, that sampling is the best way to prove our case. It will
18 be incredibly difficult to prove our case without sampling, but
19 we will be able to, you know, we are working to try and work in
20 the alternative and be able to prove our case were that to fall
21 through and some limited circumstances with other loans we
22 could use outside of sampling and so that goes to both what the
23 137 is and, you know, evidence that we're looking at for
24 outside the 137, outside the sampling population, but we think
25 that's both relevant to knowledge of Quicken and Quicken Loans'

1 knowledge in underwriting loans as it goes to the sampling
2 extrapolation as well as the United States being able to prove
3 its case in the alternative were Quicken to prevail on the
4 defenses that we don't think have merit and be able to prevail
5 in this case without sampling.

6 THE COURT: All right. Let me move on to item six,
7 damages. Mr. Morganroth?

8 MR. MORGANROTH: Yes, your Honor. In your May 26th,
9 2017 order, the Court set a June 30th, 2017 deadline for the
10 parties to supplement initial disclosures. The government
11 didn't supplement its initial disclosures. Quicken Loans did
12 supplement. The government's initial disclosures violate Rule
13 26 requirement to provide a computation in exact -- I'm sorry,
14 computation as to each category of damages claimed. That
15 hasn't been done and the case law makes clear that if a party
16 learns of additional information that renders their damages
17 computations incomplete, must supplement its disclosures to
18 include that information.

19 Things have changed in this case apparently. One
20 thing that has changed is the total loan population that's at
21 issue. It's decreased from the 3,885 in the Complaint, from
22 the 4,632 that were in a list in the third set of requests for
23 production of documents that the government furnished to now
24 2,835 loans that were part of the July 7th, 2017 disclosure.
25 The problem here is that the government has all the information

1 necessary to providing a computation of their damages and we're
2 entitled to know that. Supposed to know that at the beginning
3 of the case and we're also supposed to be able to get the
4 information if there are any changes. Not only did, were we
5 not provided that information at the beginning of the case, but
6 we're not provided the information now even though things have
7 changed.

8 The government knows the number of loans that are at
9 issue, it's that 2,835 that they've listed in their July 7th
10 disclosure. They know the amount of claims that have been paid
11 on those loans as well as the sample loans. They know the
12 amount of any recoveries that HUD has obtained through its sale
13 of foreclosed properties or the sale of notes on those loans
14 and by now they should also know the percent of loans that they
15 claim are deficient in their sample. They have all the
16 information to provide a computation, yet they have refused to
17 do that and one of the problems in this case is that there's
18 been just this hide the ball from the beginning and the case is
19 supposed to be a search for truth. It's not supposed to be a
20 sporting event or a game of sport and if your Honor recalls,
21 the government first led us to believe there are 487 loans in
22 their sample. We subsequently learned just because your Honor
23 was pressing them that there were 350.

24 Next, the government refused to disclose their
25 methodology. We had to bring a motion and your Honor had to

1 order that and now we still have, we still have issues with
2 that because the government doesn't want to tell us their
3 justification for picking their sample population, the entire
4 population that's supposedly at issue in the case. When we
5 found out that there were only 350 loans in the sample, the
6 government refused to tell us which 350 out the 487?

7 On top of that, your Honor, the government has
8 refused to tell us which loans they believe are deficient and
9 the reasons why and your Honor has entered an order that they,
10 the government has to do that by September 1st and that gets to
11 the issue of what Mr. Buffone was just speaking to. The
12 discovery that they're refusing to give us is we've asked them
13 on loans to tell us what is deficient and the reasons why and
14 the answer that's come back is we're not going to tell you
15 because we're going to prove this on sampling, the only thing
16 that we'll tell you is ultimately which loans we believe are
17 deficient and the reasons why on the sample, no other loans,
18 just the sample, yet they feel that they're free to pick 137
19 other loans and try to prove their case with those and ask us
20 for all sorts of specialized discovery on that, but we're not
21 entitled to pick any loans and ask them what they think is
22 deficient with that particular loan and the government can't
23 have this both ways. They're either trying to prove this by
24 sampling or not. At some point, you have to make that decision
25 and they've proceeded in this case on the basis that they're

1 going to try to prove this through a sample.

2 THE COURT: Well, what I just heard is that they're
3 going to try to develop two tracks; one is a sampling track and
4 the other is this group of a 137 loans through which they would
5 try to prove damages for those loans that they believe are
6 faulty loans in some respects if it turns out their sampling
7 theory doesn't hold water, so is there something wrong with
8 them trying to prepare a case in both fashions?

9 MR. MORGANROTH: Well, yes, your Honor, there is.
10 There wouldn't be anything wrong with that if they didn't try
11 limit the discovery that we're allowed to conduct based on the
12 fact that they're going try to prove this case on sampling.

13 THE COURT: Well, are they stopping you from learning
14 anything about the 137 loans?

15 MR. MORGANROTH: Well, why do they get to pick what
16 other loans the parties can do the discovery on?

17 THE COURT: Well, they're the plaintiff. They're the
18 ones who are saying they've been damaged. Their argument here
19 is in the alternative if the sampling doesn't work, we want to
20 pick 137 loans that we're saying Quicken had defrauded the
21 government through and you should be entitled under that theory
22 to take all the discovery you want regarding those 137 loans,
23 but what relevance would it be to take another loan that isn't
24 part of the sampling and is not part of the 137? It's like the
25 bank robber who says let me tell you about all the banks I

1 didn't rob. What difference does it make how many loans
2 Quicken didn't defraud the government on? If the government is
3 trying to show that Quicken was behaving improperly with
4 respect to specific loans, isn't the focus then on what did
5 Quicken do or not do with regards to those loans?

6 MR. MORGANROTH: Yes, your Honor and the answer to
7 that question depends on which of these theories they're
8 pursuing. So if they're trying to pursue the case on sampling
9 on 350 loans, we certainly are in a position to show that if
10 they tried to come up with a defect rate and extrapolate
11 against the loan population, that that extrapolation couldn't
12 possibly make sense because we could show that this loan and
13 that loan and that loan had no deficiency in the loan
14 population. We could prove that loans, you can't have that
15 defect rate extrapolated against the population because there
16 are so many loans in the population that have no defects at all
17 and a defendant isn't bound to the loans that are picked by a
18 plaintiff as being the only loans at issue in a case, to the
19 extent they're trying to extrapolate. Now if, if the
20 government intends to pursue a theory that the case is only
21 about the 137 loans, then I agree with you. I agree, your
22 Honor, that if it's only about the 137 loans, that no other
23 loans mean anything and we would focus our discovery just on
24 those 137 loans and they either prove that those loans are
25 deficient or not and to the extent they prove that some portion

1 of them are, they win damages. To the extent they can't prove
2 any of them, they lose, but if you're going to take 137 loans
3 and then try to extrapolate them against some other population,
4 yes, we're entitled to then find out whether what they're
5 extrapolating against were really deficient and that's the
6 problem. The government shouldn't be able to say we're going
7 to take 137 loans and we're going to extrapolate them against
8 2,835, but you can't learn anything about any of the other
9 2,835 and whether or not we really believe that loan was
10 deficient or what the damages would be if the loan was
11 deficient.

12 THE COURT: Well to keep it straight, I think the
13 extrapolation theory is from the 350, isn't it?

14 MR. MORGANROTH: Yes. Well, that's why I was saying
15 if the case is only about 137 loans, I agree your Honor, no
16 other loans mean anything, we would focus the case on the 137
17 loans only and we'd ask for all the discovery, take all the
18 depositions about those 137. If the case is about 350 loans
19 being extrapolated against 2,835 loans, then we're entitled to
20 discovery in terms of which loans they believe were really
21 deficient out of the 2,835, we're entitled to discovery in
22 terms of damages on each one of those that they say is
23 deficient, the reasons why and we're entitled to a damage
24 computation on these initial disclosures --

25 THE COURT: Okay, well, right now we're talking about

1 a damage calculation.

2 MR. MORGANROTH: Yeah.

3 THE COURT: So you've kind of morphed into that
4 you're entitled, that Quicken is entitled to discovery on loans
5 beyond the 350 that are within the 2,835 universe, right? Your
6 argument is what you were just talking about was going actually
7 beyond damages per se then and what had the government shown
8 yet. You're asking, advocating the broader proposition which
9 is Quicken should be entitled to take discovery on all of the
10 2,835 loans. Is that right?

11 MR. MORGANROTH: Well, what I was discussing your
12 Honor is just that we're entitled to know what this case is
13 about and that unfortunately there's been a game of sport and a
14 hiding of the ball on what this case is about. Is this case
15 about 350 loans extrapolated against 2,835 loan population? If
16 that's what this case is about, then we're entitled to know
17 what the damages are that the government is seeking on that
18 population. They haven't told us that. If the case is about a
19 different population, we're entitled to know that. If it was
20 the 3,885 which was in the Complaint, we're entitled to know
21 that and what the damages they are seeking on that 3,885
22 population. If it's the 4,600 that were in their document
23 requests, we're entitled to know that. We're left here without
24 knowing what are the damage they're seeking, what is the loan
25 population. We believe the loan population now is 2,835 based

1 on the disclosures, but we hear Mr. Buffone today saying well
2 it could be two different things and it might only been about
3 137 loans and if it's only about 137 loans, then we're entitled
4 to dual track initial disclosures, supplemented as to each of
5 those theories, under the theory of the 350, what are the
6 damages that you're seeking? Under the theory that there are
7 137 loans at issue in this case, what are the damages that
8 you're seeking and we don't have that and that's not fair and
9 that's not what the rules are created to do here. It's
10 supposed to give us that information at the beginning of the
11 case and then supplement it each time something changes
12 regarding damages in the case and we doesn't have it at the
13 beginning, we don't have it in the middle, we don't have it at
14 all. We've got this defense that well we have an expert that's
15 going to provide this. You don't need an expert. We just went
16 through the metrics. You don't need an expert to tell you what
17 the loan population is. They've already selected that. They
18 don't need an expert to tell you what the claimed amount was
19 that was paid on those loans and the sample or on the 137
20 loans. That's a defined arena where all you do need is a
21 calculator and a piece of paper to look at what those were.
22 You don't need an expert to determine how much the recoveries
23 were.

24 THE COURT: Okay. I think I get your argument. Let
25 me hear from Mr. Buffone on this issue of damages.

1 MR. BUFFONE: Your Honor, I'll just clear a couple of
2 things up for the record. The United States has disclosed what
3 are the loans that have gone to claim. They've disclosed which
4 loans those are. They've disclosed what the claims are on
5 those loans, the amount of the government paid out. To the
6 extent that there were recoveries for those claims because they
7 also had a property conveyed to the United States, the United
8 States then sold, the United States disclosed what the
9 recoveries were for those loans. They disclosed what their
10 ultimate loss was because of potential payments they made in
11 selling those properties so the United States has disclosed the
12 entire population. They have disclosed for each particular
13 loan what the claim was. They have disclosed for each
14 particular loan what the recovery was. They've also, we've
15 also disclosed what our sampling population is. We've
16 disclosed the justification for that sampling population.
17 We've disclosed how that sample was drawn, that it was a
18 simple, basic random sample where it was a simple extrapolation
19 of taking, of randomly calculating a number for each loan in
20 the sample population and selecting the first 350 that that
21 random number generator created. We've disclosed the
22 justification for using a sample like that and some of the
23 literature that goes behind using a sample like that, so
24 Quicken has the information that it's requesting. It has the
25 claim amount. It has the claim population. It has what that

1 claim amount is for each particular and specific loan. It has
2 what the government's recovery was for each particular and
3 specific loan. It has the sample population and it has how
4 that sample population was, umm, how that population, the
5 justification for that sample, so --

6 THE COURT: What are the damages that the
7 government's asking for?

8 MR. BUFFONE: I think, your Honor, that's where it
9 becomes expert testimony that we think comes best at expert
10 disclosures as that requires, one, the September 1 disclosure
11 about what are the student loans in the 350 that we are
12 alleging have deficiencies and that is, still, you know, while
13 we're certainly are advanced in that analysis, that's not
14 complete and won't be complete until September 1 when we make
15 that disclosure and then involves our sampling expert
16 extrapolating from the loans that we allege to be deficient to
17 that entire population.

18 THE COURT: So at that point would you expert then be
19 able to give an opinion about the government's damages?

20 MR. BUFFONE: I believe our expert would be able to,
21 umm, based on disclosures at that point, but then additional
22 discovery would come and, you know, that population may change
23 based on additional discovery with loans either dropping out or
24 potentially being added with new information that's learned.

25 THE COURT: Well, sure, lots of things happen during

1 the life of a case, but you can't always say it's a moving
2 target so we never have to pin a party down. Sometimes parties
3 do need to be pinned down and there's understanding that they
4 have to supplement if additional information comes along to
5 require modification of some previously-stated position, but
6 what I'm hearing from Quicken is that at some point and you're
7 telling me it's fairly soon, that the government should know
8 exactly how many loans out of the 350 sample the government
9 thinks show that Quicken defrauded the government, right? You
10 think you should know, be able to tell us that by September 1,
11 right?

12 MR. BUFFONE: We'll have an initial rough sense, your
13 Honor. I mean, there's still lots of discovery that needs to
14 be taken on those loans.

15 THE COURT: Okay. So let's just make an assumption
16 that you'll know by then. Let's say it's 35 loans out of the
17 350 so let's say there's a 10 percent fraud rate. What does
18 the government then do in terms of calculating damages? Does
19 it take -- well, you tell me. What does it do with that
20 number?

21 MR. BUFFONE: We have an expert consultant who we
22 would provide the -- you know, one, I think that number's going
23 to be higher, your Honor, but we provide that --

24 THE COURT: Well, I just picked it. I'm not even
25 suggesting there is any fraud rate, I'm just saying. I just

1 picked a number so I could figure out what we're talking about
2 here.

3 MR. BUFFONE: Yeah, but I think we would provide the
4 specific loans to the, to our expert consultant and our expert
5 consultant would do statistical analysis to extrapolate that to
6 the entire population.

7 THE COURT: And so is the entire population 2,835 or
8 is it 3,885?

9 MR. BUFFONE: I believe it is the, umm, just hold on
10 a second, your Honor, so I can be specific here.

11 (Pause)

12 MR. BUFFONE: That would be the 2,835 that that
13 extrapolation would apply to.

14 THE COURT: All right and tell me how the
15 extrapolation would work. Would it be just 10 percent of all
16 the dollars that the government paid out or loaned or what's
17 the number? 10 percent against what?

18 MR. BUFFONE: I -- it would be an -- your Honor,
19 our -- we have an expert, a PhD statistician who would be doing
20 the analysis and so we would have to ask him to do it. I think
21 it's a little more complicated than simply taking 10 percent of
22 the total population. I mean, there's a margin of error that
23 would be involved that depends on how many loans that you have,
24 the size of the population.

25 THE COURT: So shortly after September 1, you should

1 be able to know what the damage number is, right, because the
2 only thing right now that's stopping you is making a decision
3 about what percentage of the loans are allegedly fraudulent,
4 but in the meantime I assume your expert can give an opinion
5 about, once he or she knows that fraud rate, what then the
6 government's damages are, right?

7 MR. BUFFONE: I think that once we do identify in the
8 September -- I think that based off the September 1 report, the
9 expert consultant could be able to run numbers to calculate an
10 initial damages figured if required, yes, your Honor.

11 THE COURT: Okay. Now what else do you want to tell
12 me on damages? Anything else?

13 MR. BUFFONE: Your Honor, I think just going back to
14 our prior discussion, I think that the United States still
15 should have the ability to, you know, while we believe the
16 decision on sampling should be easy, that your Honor should
17 rule that sampling is proper here and it will certainly greatly
18 harm our case not to be able to use sampling. We need to be
19 able to potentially prove our case in the alternative and so we
20 still should have the right as we say in our initial
21 disclosures to use sampling, to prove our case in part through
22 sampling.

23 THE COURT: All right. So with regard to the
24 alternative case, the non-sampling theory of the government's
25 damages, would that be the 137 loans and all of the money lost

1 through those 137 loans? Is that the alternative theory of
2 damages?

3 MR. BUFFONE: Your Honor, I think we would work in
4 many different ways to try and see how we can specifically
5 identify loans where the government was defrauded, that it
6 would be impossible for us to review the entire population and
7 find all of them which is why we think that sampling is
8 justified here and it's proper here, but we would certainly try
9 and see what ways we could do to identify as many loans as
10 possible. So I think it would be a combination of the 137, the
11 loans we identify in the 350 and loans that appear to have, be
12 fraudulent from other discovery we've taken such as loans where
13 value appeals were ordered outside the 350 or management
14 exceptions were granted to FHA underwriting requirements or we
15 come across other evidence that potentially shows that the
16 government was defrauded in a loan that went to claim.

17 THE COURT: All right and you're going to be
18 disclosing all of that by September 1?

19 MR. BUFFONE: As we understood it, your Honor, the
20 September 1 disclosure was for the loans, the 350, the sample
21 population.

22 THE COURT: All right.

23 MR. BUFFONE: It's, if your Honor --

24 (Pause)

25 THE COURT: So in the government's view then, it's

1 not under any time table when it has to disclose what loans
2 beyond the 350 plus the 137, what loans it's claiming are
3 fraudulent beyond those?

4 MR. BUFFONE: I mean, your Honor, I think that it's
5 a -- I think it's all a question of whether the Court comes
6 down on sampling as the United States is trying to see how it
7 would -- is trying to think about how it would prove the case
8 were the Court to rule against, that the United States is,
9 believes strongly that the Court will uphold sampling of, the
10 United States will prove its case primarily, if not entirely
11 through the sample, but the United States is thinking because
12 the Quicken, you know, I think that we would be engaged in all
13 practice, we weren't thinking about it that as Quicken's
14 asserting the defense that the United States cannot use
15 sampling, how would we be able to prove our case if we did not
16 use sampling.

17 THE COURT: Well, you may not know where the Court
18 stands on sampling until very late in the game. Many of the
19 cases that have occurred the issue of sampling have considered
20 that issue in connection with a motion for summary judgment
21 that gets filed sometimes late in the case and some of those
22 cases say that, you know, it'll be up to a jury to decide
23 whether the sampling methodology is appropriate or not
24 appropriate, so if you're looking for some early decision from
25 me, there's no guarantee that's going to happen.

1 MR. BUFFONE: Yes, your Honor. We, you know, we do
2 understand that and do understand that it is a risk that we are
3 taking.

4 THE COURT: All right, but I want to go back to my
5 question. The order that I entered on May 26th did require the
6 government to disclose which loans of the loan selection which
7 is a total package of the 350 plus the 137, it was claiming
8 supported its position here of False Claims Act violations or
9 other actionable activity, so now I'm hearing that the
10 government may decide it's going to pick another loan and
11 another loan and another loan to show its damages under this
12 alternative theory, the non-sampling theory. When, when is
13 that going to be disclosed?

14 MR. BUFFONE: I -- and your Honor, I did misspeak in
15 saying that the September 1 is just the loan sample, just the
16 loan selection, you are correct. I do not believe that that's
17 currently in the discovery plan, your Honor.

18 THE COURT: I'm sorry, what?

19 MR. BUFFONE: I said I don't believe that a
20 disclosure of that's currently within the discovery plan.

21 THE COURT: Well when you say that, what do you mean
22 by that? What's not in the discovery plan?

23 MR. BUFFONE: Loans that the United States, if the
24 United States were to try and prove loans outside of the loan
25 selection that are outside that it does not intend to prove

1 through sampling in this case.

2 THE COURT: All right, so when do you think you're
3 going to disclose that if it's not September 1?

4 MR. BUFFONE: At a minimum, your Honor, I think we
5 would disclose that in expert reports as the loans that our
6 expert is asserting are have contain material deficiencies.

7 THE COURT: Are you talking about July 2nd, 2018?

8 MR. BUFFONE: Yes, your Honor.

9 THE COURT: That's kind of late in the game, don't
10 you think?

11 MR. BUFFONE: Umm, no, your Honor I think 'cause
12 there would be extensive discovery that's taken. You know,
13 Quicken is not limiting its discovery of HUD just to the loans
14 and loan selection. It's taking broad-based discovery into HUD
15 and HUD's rules and HUD's rules regarding the relevant issues
16 at issue in this case.

17 THE COURT: All right. What else do you want to tell
18 me?

19 MR. BUFFONE: Your Honor, I think that under the case
20 law, the United States has provided Quicken the information it
21 needs to calculate damages and has provided sufficient
22 disclosures as it relates to damages, so that's met its duty.
23 Thank you, your Honor.

24 THE COURT: Okay. Mr. Morganroth, do you want to
25 address any of that?

1 MR. MORGANROTH: Yes, your Honor. Rule 26 doesn't
2 allow for a plaintiff just to say well we gave you a bunch of
3 documents, you go figure it out. You have to give a
4 computation of each category of damages plus you have to
5 produce the relevant documentation. We may have the relevant
6 documentation. It's hard to tell because they won't give us a
7 computation of each category of damage and if their -- if the
8 government has a dual track on this case, then they have to do
9 it for both tracks and you can't do it 2018 during expert
10 reports. That's not what the rules were designed to do to
11 protect parties. There has to be initial disclosures and they
12 have to be supplemented as things change in a case and things
13 have changed in this case. We're now talking about sample
14 population of 2,000 or a total population of 2,835 which is
15 less than the 3,885 that were listed in the Complaint and we're
16 entitled to know what this case is about, especially because at
17 various times there have been discussions about having
18 mediation and how do we have effective discussions about
19 potential settlement or mediation if we don't even know what
20 the case could possibly be in terms of the amount of dollars
21 that's being sought? Mr. Buffone says it's something they
22 can't do right now. He certainly has acknowledged they can do
23 it by September 1st. It's hard for us to, to swallow that the
24 government can't do this now. In pre-litigation, there were
25 demands made by the government and they computed what they

1 thought the damages were on loans. Now that's a different set
2 of loans and they had different theories than they have now,
3 but they were able to compute it and give us line verse, pages
4 of how they computed their damages which by coincidence would
5 have complied with Rule 26 if that was during the case and
6 those were the loans that they were pursuing and that's all
7 we're asking for in a Rule 26. We're entitled to that. We're
8 entitled to an even playing field to know what this case is
9 about; if it's sampling, which loans, what's the justification,
10 which loans that they claim are deficient and the reasons why
11 and that's all we want is to get our rights as a defendant to
12 be able to have a fair case.

13 THE COURT: All right. We're going to take a
14 15-minute break. We'll come back at 3:25.

15 MR. MORGANROTH: Thank you, your Honor.

16 (Recess taken at 3:12 p.m.)

17 (Reconvened at 3:33 p.m.)

18 THE CLERK OF THE COURT: Please rise. Court is back
19 in session. You may be seated.

20 THE COURT: One other point raised by the government
21 in its memorandum has to do with the attorney eyes only
22 designations. You told me at the beginning of our hearing
23 today that there may be some progress on that front. Let me
24 ask you, where do you stand now on that issue?

25 MR. MORGANROTH: So the issue initially was about

1 8,000 documents and that was what was discussed during the
2 prior hearing and was the subject matter of the May 26th order.
3 There were 8,000 documents the government felt had some
4 sensitive information that warranted attorney eyes only
5 protection and your Honor embraced a solution allowing the
6 government to produce those materials to us, either redacted or
7 with designations of AEO so we could look at those documents
8 and then make a determination if we disagreed with any
9 protection being warranted and if, even if we didn't disagree,
10 whether we had problems mounting our defense and pursuing our
11 defense because we wouldn't be able to show that information to
12 and consult with our client on that, so the 8,000 documents
13 were produced, but a bigger issue arose because there's now
14 been 48,000 documents produced which virtually all of them were
15 designated AEO, so the problem was that in looking through,
16 there were only two categories, your Honor, indicated could be
17 designated AEO and that was pursuant to the government's
18 delineation of what they were worried about and one category
19 was information related to HUD's function as a regulator which
20 could allow Quicken Loans to reverse engineer certain ways in
21 which HUD oversees lenders and thus avoid enforcement. That
22 was one category and the other one was proprietary information
23 of Quicken Loans' business competitors. So to the extent that
24 there was any information, any documents that fell within these
25 two categories, those portions of the documents could be

1 designated AEO. What happened was the government just
2 designated entire swaths of documents AEO even if there may
3 have been just one line that they were concerned about and some
4 documents didn't appear to have any information that fell in
5 either of these categories, it just mentioned a lender's name,
6 some other lender's name so we did have some meet and confers
7 on this and the problem is that some of the documents that were
8 marked AEO were publicly-available documents. Other ones were
9 like the regulations themselves. Some were, had the guideline
10 interpretations and that portion had nothing to do with AEO,
11 but it mentioned another lender's name so the whole document
12 was apparently designated AEO. What the government explains to
13 us during these meet and confers is that's what they did. They
14 didn't try to just designate the portion of any document, they
15 just designated the entire document and we had asked for them
16 to redesignate the document so there's just the portion and
17 then we could analyze whether or not we agreed with them and/or
18 whether that would impact our ability to defend the case 'cause
19 we couldn't consult with Quicken Loans.

20 The progress that we have made is it appears that the
21 government has conceded these examples we gave that were
22 over-designations and that it would essentially burden Quicken
23 Loans because we wouldn't be able to consult with our client
24 and that they would redesignate the second category, the
25 proprietary information of Quicken Loans' business competitors

1 as non-AEO. They would not designate any of the documents AEO
2 if it had quote "proprietary information of Quicken Loans'
3 business competitors." What they wanted to do instead is
4 modify the current protective order we have in terms of
5 confidentiality, having agreement that we can show it to anyone
6 at Quicken Loans, but we would limit it to only those that we
7 felt had a need to see it for the defense of this case and in
8 concept, we don't have a problem with that and that's what
9 we're already doing anyway with anything that's marked
10 confidential. So it appears that that would resolve that
11 category, that they would redesignate and they wouldn't
12 designate anything in the future as AEO relating to the other
13 lender business competitors.

14 The second, the other category on we'll say the
15 enforcement regime and potentially allowing Quicken Loans to,
16 to reverse engineer and threaten their enforcement mechanism,
17 umm, I don't think we've reached the finish line, but I think
18 it's something that we could reach the finish line. We don't
19 think it's unreasonable for the government to actually
20 designate a portion of a document if they think that that
21 portion falls within that category. The original example on
22 this was data dictionaries which supposedly had a portion of
23 the data dictionaries that related to PETR reviews and
24 supposedly would give insight into what would triggers this
25 PETR review and they didn't want Quicken Loans to see that.

1 The government did produce those and did designate that
2 portion, only that portion of the data dictionary AEO and
3 that's the way we believe it would be appropriate if there's a
4 future document that would, the government thinks falls in that
5 category, to designate just that portion of the document and
6 then allowing us to see what they think is sensitive, the
7 lawyers, and if it's something that we really think we need to
8 share with our client, we would meet and confer with them and
9 explain why and try to resolve it. The disconnect is that we
10 haven't gotten confirmation that the government would agree to
11 that process. It seems like they want to still just mark
12 entire documents AEO even if there's just one line of that
13 document that might fall in that category. That's problematic
14 to us and not only does it create problems 'cause we don't know
15 what portion they're really trying to designate as AEO, and but
16 it creates a burden. It shifts the burden onto us to try to
17 figure that out and then all sorts of other information that
18 has, wouldn't be entitled to any kind of protection, we
19 wouldn't be able to share with our client so it would give us a
20 bigger job and an unfair job of trying to determine and meet
21 and confer with the government on all of this other information
22 that are in documents that wouldn't be subject to this
23 sensitive protection that they think applies, so the last we
24 left it, we heard that we didn't have a specific agreement on
25 this and we had asked for some examples of how they would go

1 about doing this with specific documents unrelated to the data
2 dictionary and I think Mr. Buffone said he would give us those
3 examples.

4 The wording in this confidentiality, you know, the
5 protective order that would be modified, there were some
6 problems with that although it seems like we're going to be
7 able to work through those, so I think that summarizes where we
8 think we're at. I don't know if Mr. Buffone has a different
9 point of view.

10 THE COURT: Well, this is something you raised in the
11 Quicken memorandum so how do you suggest we proceed at this
12 point?

13 MR. MORGANROTH: Well, I think at this point what
14 we're agreeable to is the procedure, applying the procedure
15 that your Honor had made part of the May 26th order which is it
16 would require re-designation of documents so that they're only
17 designating the portion that would fall within what they
18 believe is AEO protection which would then allow Quicken Loans'
19 attorneys to review that portion only and determine whether or
20 not we agree and if it's something that we felt we would need
21 to share with our client and consult with them about to be able
22 to pursue a meaningful defense.

23 The second thing is we would accept the government's
24 proposal that they would redesignate the production with
25 respect to the second category as just confidential, the

1 proprietary information of Quicken Loans' business competitors
2 and we would agree and confirm that we will only show those
3 materials to Quicken Loans' representatives to the extent that
4 we believe or feel that it, they would or should need to review
5 those documents as part of the defense of this case. We would
6 need the, this 48,000 documents or so to be redesignated so
7 that it's just not whole swaths of documents including
8 publicly-available documents, the regulations, the
9 interpretation of guidelines and so forth. So that's what we
10 would ask at this point and that's what we're trying to work
11 towards with the government in terms of an agreement, so in the
12 future it would only be category one and in the future they
13 would only designate the portion of a document that they feel
14 belongs in category one and category two, this business
15 competitor category would only be a confidential designation
16 with our confirmation that we would limit who would receive it
17 and review it based on the need to know.

18 THE COURT: All right. Mr. Buffone, how do you
19 suggest we proceed?

20 MR. BUFFONE: Your Honor, I think Mr. Morganroth went
21 over a lot of ground and characterized a lot of the
22 government's production as well as our conversations in ways
23 that we disagree with and I can certainly go into that to the
24 extent the Court needs to hear, but I think the bottom line
25 that Mr. Morganroth confirms is what we said in our motion that

1 or in our memorandum that the parties are discussing this, it
2 appears that we are close to a compromise, you know, some of
3 the offers that Mr. Morganroth was saying and some of their
4 requests were made this morning before the hearing so there's
5 certainly more discussions to be made. We have not heard a
6 response to our draft stipulated protective order to deal with
7 some of the concerns that Quicken has, but I think that we ask
8 the Court for more time so the parties can continue this
9 discussion and resolve it without the Court's intervention, and
10 your Honor, if I may, on the previous discussions that we had
11 during the break, the United States thought further about what
12 the concerns your Honor raised and we -- the United States did
13 offer to Quicken and is willing to supplement its initial
14 disclosures with the calculation, initial calculation of
15 damages as it relates to the sample extrapolation by October 1,
16 a month after and so we put that to Quicken. I don't think we
17 got a confirmation whether or not that's agreeable to them, but
18 I do put in the one stipulation that I have not had an
19 opportunity to consult with our expert to ensure that our
20 expert's not on vacation the entire month of September, but
21 barring any unforeseen circumstances with his, with that
22 availability, we'd be willing to supplement with our
23 extrapolation, with our initial damages figure as it relates to
24 the extrapolation of the sample by October 1, your Honor.

25 THE COURT: All right. Are there any other issues

1 that we need to take up at this point?

2 MR. BUFFONE: None from the United States, your
3 Honor.

4 MR. MORGANROTH: No, your Honor.

5 THE COURT: All right. I do want to meet the
6 attorneys back in our jury room so my clerk's going to take you
7 back there. That concludes our hearing. Thank you.

8 MR. MORGANROTH: Thank you, your Honor.

9 MR. BUFFONE: Thank you, your Honor.

10 (Hearing concluded at 3:47 p.m.)

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C E R T I F I C A T E

I, David B. Yarbrough, Official Court
Reporter, do hereby certify that the foregoing pages
comprise a true and accurate transcript of the
proceedings taken by me in this matter on Monday, July
31st, 2017.

8/2/2017

Date

/s/ David B. Yarbrough

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